Chapter 9

Diplomatic Relations, Succession, and Continuity of States

A. ICJ ADVISORY OPINION ON KOSOVO'S DECLARATION OF INDEPENDENCE

On April 17, 2009, at the invitation of the Court, the United States was among a number of countries that submitted written statements to the International Court of Justice ("ICJ" or "Court") concerning the request by the UN General Assembly for an advisory opinion on the question "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?" On July 17, 2009, the United States submitted Written Comments to the Court. On December 8, 2009, Harold Hongju Koh, Department of State Legal Adviser, delivered an oral statement of the U.S. views to the Court. Mr. Koh's statement, set forth below (most footnotes omitted; those that are included follow the numbering in the ICJ verbatim record), is also available at *www.icj-cij.org/docket/files/141/15726.pdf*. The full texts of all of the written submissions and oral proceedings in the case are available at *www.icj-cij.org/docket/index.php?p1=3&p2=4&code=kos&case=141&k=21*.[*]

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[*] Editor's note: On July 22, 2010, the Court issued its advisory opinion, in which it stated that it was of the opinion that the declaration of independence of Kosovo did not violate international law. In remarks to the press on July 22, 2010, Mr. Koh explained that

> [t]he Court by a vote of 10 to 4 concluded that adoption of Kosovo's declaration of independence did not violate rules of general international law, nor did it violate UN Security Council Resolution 1244 or the constitutional framework that had been established to guide interim stabilization of Kosovo.
>
> With respect to each of its legal conclusions, the Court accepted the views of the authors of Kosovo's declaration of independence, as well as the views of the United States Government which had appeared in support of Kosovo's legal position.

Mr. Koh's remarks are available in full at *http://fpc.state.gov/145040.htm*. *See also* the statement issued by Secretary of State Hillary Rodham Clinton on July 22, available at *www.state.gov/secretary/rm/2010/07/145042.htm*. The Court's advisory opinion is available at *www.icj-cij.org/docket/files/141/15987.pdf*.

1. Mr. President, honorable Members of the Court, it is a great honor to appear before you today on behalf of the United States of America, a nation born of a declaration of independence more than two centuries ago, to urge this Court to leave undisturbed the Declaration of Independence of the people of Kosovo.

2. The United States appears today as a friend of both Serbia and Kosovo. The people of the United States share a bond of friendship with the people of Serbia marked by co-operation in two world wars and long-standing political and economic ties that date back at least to the bilateral Treaty of Commerce of 1881. Our relationship with the people of Kosovo, strengthened through crisis these last two decades, continues to grow. That said, our sole task today is to address the narrow legal question before this Court.

3. Over the past week, those pleading before you have discussed a broad range of issues, including the validity of recognitions of Kosovo, the effectiveness of the United Nations, the legality of military actions in 1999, and the potential responsibility of non-State actors for internationally wrongful acts. Yet the precise question put to this Court is much narrower: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?" The answer to that question, we submit, is: Yes. For as a general matter, international law does not regulate declarations of independence, nor is there anything about Kosovo's particular Declaration that would render it not "in accordance with international law." Standing alone, a declaration neither constitutes nor establishes political independence; it announces a political reality or aspiration that must then be achieved by other means. Declaring independence is fundamentally an act of popular will—a political act, made by a body politic, which other States then decide whether to recognize or not.

4. To say that international law does not generally authorize or prohibit declarations of independence signals no lack of respect either for international law or for the work of this Court. Rather, such a statement merely recognizes that international law does not regulate every human event, and that an important measure of human liberty is the freedom of a people to conduct their own affairs. In many cases, including Kosovo's, the terms of a declaration of independence can mark a new nation's fundamental respect for international law. As our own Declaration put it, a "decent respect to the Opinions of Mankind" dictates "that facts be submitted to a candid world." Of the more than 100 declarations of independence issued by more than half of the countries in the world,[20] we know of none that has been held by an international court to violate international law. We submit that this Court should not choose Kosovo's Declaration of Independence as the first case for such unprecedented judicial treatment. For few declarations can match the political legitimacy of Kosovo's peaceful declaration, which issued from a body representing the will of the people, which was born of a successful, decade-long United Nations effort to bring peace and security to the Balkans region, and reflected the capacity of the people of Kosovo to govern themselves. As the principal judicial organ of the United Nations, this Court should decline the invitation to undo the hard work of so many other parts of the United Nations system, potentially destabilizing the situation and unravelling the gains so painstakingly achieved under resolution 1244.

5. Mr. President, a careful consideration of the pleadings before this Court compels three conclusions, which will structure the rest of my presentation:

– *First*, Kosovo's Declaration of Independence brought a necessary and stabilizing end to a turbulent chapter in the history of the Western Balkans, and made possible a transition to a common European future for the people of Kosovo and their neighbors. The real question this Court faces is

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[20] David Armitage, *The Declaration of Independence: A Global History* 3, 20 (2007).

whether to support reopening of this tragic past or whether instead to let Kosovo and Serbia look forward to this more promising future.

– *Second*, as a legal matter, there is no inconsistency between Kosovo's peaceful Declaration of Independence and principles of international law, including Security Council resolution 1244. Like others attending these proceedings who participated in these historical events, I attended the Rambouillet negotiations as United States Assistant Secretary of State for Democracy, Human Rights and Labor, and observed the great pains taken to respect international law and to preserve human rights throughout the lengthy diplomatic negotiations that led to resolution 1244, and ultimately to Kosovo's Declaration. We respectfully submit that a Security Council resolution drafted with such an intent did not give birth to a declaration of independence that violates international law.

– *Third*, and finally, we question whether this case—which involves an unprecedented referral of a narrow, anomalous question—marks the appropriate occasion for this Court to exercise its advisory jurisdiction. But should the Court decide that it must render an advisory opinion, the Court would best be served by answering that narrow question in the affirmative: Kosovo's Declaration of Independence *is* in accordance with international law.

I. KOSOVO'S DECLARATION OF INDEPENDENCE

6. Mr. President, you have now heard many times the story of Kosovo's Declaration of Independence and the trauma from which it was born. That Declaration was the product of not one, but three overlapping historical processes, which did not preordain Kosovo's Declaration, but do help to explain it—the disintegration of Yugoslavia; the human rights crisis within Kosovo; the United Nations response.

7. First, from the *Bosnia* case, this Court knows well the painful story of the Yugoslav process: the rise of Serb nationalism in the 1980s, followed by the break-up first of the Socialist Federal Republic of Yugoslavia (SFRY) in 1991–1992, then of the Federal Republic of Yugoslavia (FRY) more than a decade later. You know of the successive independence of Slovenia, Croatia, Bosnia and Herzegovina, Macedonia, Montenegro and, finally, of Kosovo.

8. Second, you have heard about Kosovo's internal process: the grim, well-chronicled background of atrocities and ethnic cleansing; how the people of Kosovo suffered years of exclusion from public facilities and offices; how some 10,000 people were killed in State-sponsored violence, how 1 million people were driven from the territory, and how the people of Kosovo developed self-government over nearly ten years of separation from Belgrade. You know of the dramatic escalation of oppression by Belgrade in the late 1990s; of the atrocities that were recorded by the United Nations and human rights organizations; of the unsuccessful attempt to achieve a solution acceptable to both Serbia and Kosovo at Rambouillet; of the brutal campaign of ethnic cleansing launched by Belgrade against ethnic Albanians in the spring of 1999; and of the eventual adoption of Security Council resolution 1244 in June of that year.

9. Third, the Declaration at issue did not happen spontaneously; it emerged only after an extended United Nations process, in which a United Nations administration focused on developing Kosovo's self-governing institutions, and a sustained United Nations mediation effort exhausted all available avenues for a mutually agreed solution, before finally concluding—in [Special Envoy] Martti Ahtisaari's words—that "the only viable option for Kosovo is *independence*."

10. By adopting resolution 1244, the Security Council sought to create a framework to promote two goals. The first was to protect the people of Kosovo, by building an interim environment where they would be protected by an international *security* presence—the NATO-led

KFOR—and where they could develop political institutions free from Belgrade's coercion under an international *civil* presence in the form of UNMIK. Second, the resolution authorized the international civil presence to facilitate a political process designed to determine Kosovo's future status, but only at a later stage.

11. This United Nations umbrella and game plan provided critical breathing space for Kosovo to stabilize and develop effective Provisional Institutions of Self-Government (PISG): an elected assembly, a president, a prime minister, ministries and a judiciary. UNMIK steadily devolved authority to those Kosovo institutions, allowing the people of Kosovo to rule themselves free from Belgrade's influence. In 2005, the Secretary-General's Special Envoy Kai Eide found the status quo unsustainable, which led the United Nations Security Council to launch a political process, led by Special Envoy Martti Ahtisaari, to determine Kosovo's future status. But after many months of intensive negotiations involving all interested parties, Special Envoy Ahtisaari concluded in March 2007: (1) that even with autonomy, Kosovo's reintegration with Serbia was "simply not tenable"; (2) that continuing interim administration without resolving Kosovo's future status risked instability; and (3) that further efforts to find common ground between Kosovo and Serbia were futile. In Mr. Ahtisaari's words, "the negotiations' potential to produce any mutually agreeable outcome on Kosovo's status is exhausted," and "[n]o amount of additional talks, whatever the format, will overcome this impasse." Going forward, the Envoy concluded, "the only viable option for Kosovo is *independence*, to be supervised for an initial period by the international community."

12. While some in these proceedings have questioned the integrity and impartiality of the Special Envoy, a most distinguished Nobel Laureate, the Secretary-General confirmed his full support for the Special Envoy's recommendations, having himself, in the Secretary-General's words, "taken into account the developments in the process designed to determine Kosovo's future status." The entire Contact Group "endorsed fully the United Nations Secretary-General's assessment that the status quo is not sustainable." And the Council of the European Union—including even those members who would later decline to recognize Kosovo's independence—expressed its "full support" for the Special Envoy and "his efforts in conducting the political process to determine Kosovo's future status."

13. Nevertheless, a "Troika" of senior negotiators was charged to make a last-ditch effort to find a negotiated solution. According to their report, the Troika "left no stone unturned in trying to achieve a negotiated settlement of the Kosovo status question." But when those Troika talks also reached impasse, Kosovo's elected leaders consulted widely and, on 17 February 2008, issued their Declaration announcing Kosovo as "an independent and sovereign state."

14. Like many declarations of independence, Kosovo's Declaration was a general manifesto, published to all the world, that affirmed the new State's commitments as a member of the international community. The Declaration accepted the obligations in the Ahtisaari Plan, and announced Kosovo's desire for friendship and co-operation with Serbia and all States.

15. Today, nearly two years later, we see that the Declaration of Independence was the ultimate product of all three processes I have described: it brought closure to Yugoslavia's disintegration; it enshrined human rights protections for all communities within Kosovo; and it broke the impasse in the United Nations process. Yesterday (CR 2009/29), counsel for Cyprus colorfully but inaptly suggested that the United Nations Security Council was involved in the "amputation" of Kosovo and the "dismemberment" of Serbia. But Cyprus never mentioned that Kosovo became independent not because of unilateral, brutal United Nations action, but through the interaction between a United Nations process that helped end brutality, and the parallel processes of Yugoslavia's disintegration and increasing Kosovo self-governance.

16. The simple fact is that resolution 1244 works. Without preordaining, it permitted Kosovo's independence. Kosovo is now independent and functioning effectively. Kosovo has been recognized by 63 nations, and all but one of its immediate neighbors, including former Yugoslav republics Slovenia, Croatia, Macedonia, and Montenegro. No fewer than 115 of the world's nations have treated Kosovo as a State, by either formally recognizing it or voting for its admission to international financial institutions. And the 2008 Declaration of Independence has opened the way for a new European future for the people both of Kosovo and the wider Balkans region.

II. LEGAL ARGUMENTS

17. Mr. President, against this reality, Serbia now seeks an opinion by this Court that would turn back time, although doing so would undermine the progress and stability that Kosovo's Declaration has brought to the region. As a legal matter, this Court should find that Serbia's desired outcome is dictated neither by general principles of international law, nor by Security Council resolution 1244.

A. General international law

18. As we detailed in our written pleadings, Kosovo's Declaration of Independence declared a political aspiration, which cannot by itself violate international law. General international law does not as, a general matter, prohibit or authorize declarations of independence.[40] Other nations accept or reject the legitimacy of a declaration of independence by their willingness or refusal to treat the entity as a State: and that test only confirms the legitimacy of Kosovo's Declaration here. But without citing any authority, Serbia asks this Court to adopt the opposite, sweeping rule: that when territory has not been illegally annexed, Serbia claims, the international law principle of territorial integrity prohibits *all* non-consensual secessions, *a fortiori*, prohibits all declarations of independence, except where domestic law grants a right of secession or the parent State accepts the declaration before or soon after the secession. Yet as our written filings establish, no such general international law rule bars declarations of independence, nor can there be such *ad hoc* exceptions to a general rule that does not exist.

19. To see that international law does not prohibit declarations of independence simply because they were issued without the parent State's consent, one need look no further than

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[40] See Malcolm Shaw, "Re: Order in Council P.C. 1996-1497 of 30 September 1996," in *Self-Determination in International Law: Quebec and Lessons Learned*, p. 136 (Anne Bayefsky, ed. 2000) ("It is true that the international community is very cautious about secessionist attempts, especially when the situation is such that threats to international peace and security are manifest. Nevertheless, as a matter of law the international system neither authorizes nor condemns such attempts, but rather stands neutral. Secession, as such, therefore, is not contrary to international law."); John Dugard and David Raič, "The Role of Recognition in the Law and Practice of Secession", in *Secession: International Law Perspectives*, p. 102 (Marcelo Kohen, ed. 2006) ("One will search in vain for an explicit prohibition of unilateral secession in international instruments. The same is true for the explicit recognition of such a right."); Daniel Thürer, "Secession", in *Max Planck Encyclopedia of Public International Law* (Rüdiger Wolfrum, ed.) available at *http://www.mpepil.com*, p. 2 ("International law, thus, does not state conditions of legality of a secession, and neither does it provide for a general 'right of secession'. It does not in general condemn movements aiming at the acquisition of independence, either."); see generally US Statement, pp. 50–55; US Comment, pp. 13–14.

Yugoslavia, where the Slovenian and Croatian declarations of independence initiated Yugoslavia's break-up in 1991. When those declarations issued, Belgrade also declared, wrongly, that both declarations violated both Yugoslav and international law. But today, Belgrade no longer makes those claims. To the contrary, Serbia now asserts that Slovenia's and Croatia's secessions were lawful under international law *because* they were permitted under Yugoslav domestic law, although Belgrade took precisely the opposite position at the time.[43] In reversing its position, Belgrade nowhere explains how the international law rule in this area can turn on a question of domestic law that the international community cannot knowledgeably evaluate. And the second *ad hoc* exception that Serbia offers—that a parent State can make lawful an unlawful declaration by later acceptance—conflicts with its own arguments in these proceedings: that the illegality of a declaration cannot be cured by subsequent events.

20. Neither did Kosovo's Declaration violate the general principle of territorial integrity. For that basic principle calls upon States to respect the territorial integrity of *other States.* But it does not regulate the internal conduct of groups *within* States, or preclude such internal groups from seceding or declaring independence.[44] Citing Security Council resolutions, Serbia claims that the obligation to respect territorial integrity also regulates non-State actors and precludes them from declaring independence, whether peacefully or not. But none of the resolutions it cites support that claim. We do not deny that international law may regulate particular declarations of independence, if they are conjoined with illegal uses of force or violate other peremptory norms, such as the prohibition against apartheid. But that is hardly the case here, where those declaring independence did not violate peremptory norms. In fact, Kosovo's Declaration makes such a deep commitment to respect human rights precisely because the people of Kosovo had experienced such egregious human rights abuses.

B. Resolution 1244

21. Mr. President, Kosovo's Declaration of Independence comports not just with general rules of international law, but also with resolution 1244, which—as our written submissions

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[43] Compare Written Comments of the Government of the Republic of Serbia ("Serbia Comments"), para. 201 ("With regard to domestic law, some constitutions provide for a right to secession, as it was the case of the S.F.R.Y., only with regard to the six constituent nations"), with Stands and Conclusions of the S.F.R.Y. Presidency Concerning the Situation in Yugoslavia, 27 June 1991 (reprinted in *Yugoslavia Through Documents: From Its Creation to Its Dissolution*, Snezana Tifunovska (ed.), 1994, p. 305 (describing the Slovenian and Croatian declarations as "anti-constitutional and unilateral acts lacking legality and legitimacy on the internal and external plane").

[44] See Georges Abi-Saab, "Conclusion", in *Secession: International Law Perspectives*, Marcelo Kohen (ed.), 2006, p. 474 ("[I]t would be erroneous to say that secession violates the principle of territorial integrity of the State, since this principle applies only in international relations, i.e. against other States that are required to respect that integrity and not encroach on the territory of their neighbours; it does not apply within the State."); Malcolm Shaw, "Re: Order in Council P.C. 1996-1497 of 30 September 1996", in *Self-Determination in International Law: Quebec and Lessons Learned*, Anne Bayefsky (ed.), 2000, p. 136) ("[I]t must be recognized that international law places no analogous obligation [of respect for territorial integrity] upon individuals or groups within states. The provisions contained in the relevant international instruments bind states parties to them and not persons and peoples within states."); see generally US Comments, pp. 15–20.

detail—anticipated, without predetermining, that independence might be an appropriate outcome for Kosovo's future status.

22. Mr. President, Members of the Court, if you will look with me at the text of resolution 1244, you will see it was overwhelmingly driven by the Council's overriding concern for resolving the humanitarian and human rights tragedy occurring in Kosovo. It demands that the Federal Republic of Yugoslavia "put an immediate and verifiable end to violence and repression in Kosovo" by beginning a verifiable phased withdrawal of security forces on a timetable synchronized with the phased insertion of an international security presence. And the key paragraphs 10 and 11 authorize the establishment of an international civil presence to "[f]acilitat[e] a political process designed to determine Kosovo's future status, *taking into account the Rambouillet accords*."

23. Serbia claims that 1244's explicit reference to Rambouillet "clearly adopt[ed] the principle of the continued territorial integrity and sovereignty of the F.R.Y. over Kosovo." But at the time, Serbia claimed the opposite: it called the Rambouillet Accords an "unprecedented attempt to impose a solution clearly endorsing the separatists' objectives." This is not surprising, because as you heard yesterday from Denmark, a prime objective at Rambouillet was to respect the will of the people of Kosovo. That is why, as we have seen, Rambouillet carefully avoided predetermining any particular political outcome, on the one hand, neither favoring independence, but on the other, never ruling that possibility out.

24. Nor did anything in resolution 1244's description of the future status process give Serbia a veto over a future Kosovo declaration of independence. To the contrary, the Rambouillet Accords, to which resolution 1244 refers, rejected any requirement that the FRY consent to Kosovo's future status. In the negotiations over the Accords—and the four so-called "Hill Agreements" upon which Rambouillet was modeled—the negotiators rejected any requirement that the Federal Republic of Yugoslavia consent before Kosovo's future status could be finally determined. As Professor Murphy explained last Tuesday (CR 2009/25), the first three drafts of the Hill Agreements would have required the FRY's express agreement to change Kosovo's status at the end of the interim period. But, in the fourth draft of the Hill Agreement, that language was placed in brackets, and no similar requirement for Belgrade's approval of future status appeared in the final version of either the Rambouillet Accords or resolution 1244.

25. Some have claimed during these oral proceedings that the reference in the preamble of resolution 1244 to the "territorial integrity" of the Federal Republic of Yugoslavia proved that the Security Council was foreclosing independence as a possible outcome. During these proceedings, one State that sat on the Security Council at the time suggested that all States understood resolution 1244 to guarantee permanently the "territorial integrity" of the Federal Republic of Yugoslavia. But if that were true, why did the Federal Republic of Yugoslavia protest at the time that the resolution "opens up the possibility of the secession of Kosovo . . . from Serbia and the Federal Republic of Yugoslavia?"[55] And why did nine of the States that were on the Security Council when it adopted resolution 1244—Bahrain, Canada, France, Gambia, Malaysia, Netherlands, Slovenia, the United Kingdom and the United States—later recognize Kosovo, if they had already supposedly voted for a resolution that permanently barred its independence?

26. What Serbia's argument leaves out is the telling silence in resolution 1244, the dog that did not bark. Resolution 1244 said absolutely nothing about the territorial integrity of the Federal

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[55] Remarks of Mr. Jovanović, Chargé d'affaires of the Permanent Mission of Yugoslavia to the United Nations, in Security Council debate on adoption of resolution 1244, S/PV.4011, 10 June 1999, p. 6, Dossier No. 33.

Republic of Yugoslavia *beyond the interim period.* Unlike the previous United Nations Security Council resolutions on Kosovo, resolution 1244 qualifies its reference to territorial integrity with the phrase "as set out in Annex 2." But Annex 2 refers to territorial integrity only in paragraph 8, which in turn describes only the political framework agreement that will cover the *interim period.* And while the text of 1244 reaffirms the commitment of "member states"—not internal groups—to the territorial integrity of the FRY, even this it did only *during the interim period*, without limiting the options for future status.

27. As important, the resolution refers not to preserving the territorial integrity of Serbia, but the territorial integrity of the *Federal Republic of Yugoslavia*, an entity that no longer exists.[57] Even though the resolution required Kosovo to remain within the FRY, it never required Kosovo to remain within "Serbia." To the contrary, as we have explained, the resolution specifically avoided any such implication, to preserve the possibility of what were called at the time "third republic options," under which Kosovo might end up as a third republic within the borders of a three-republic Federal Republic of Yugoslavia, alongside Serbia and Montenegro.[58]

28. Resolution 1244's reference to territorial integrity was further qualified by the resolution's explicit reference, in preambular paragraph 10, not just to Annex 2, which as I have explained applied only during the interim period, but also to the Helsinki Final Act. The Helsinki reference underscored the Security Council's overriding humanitarian concern with protecting civilians, by keeping Kosovo detached from the Serbia that had so harshly oppressed them. Kosovo had famously suffered massive, systematic human rights abuses throughout the decade, which led the FRY to be suspended from participation in the OSCE. And thus, 1244's pointed reference to the Helsinki Final Act underscored that the Security Council was reaffirming the FRY's territorial integrity, not as an absolute principle, but as only one of many principles—including most obviously, Helsinki human rights commitments—that would need to be considered with each principle—in the Final Act's words—"being interpreted taking into account the others[.]"

29. Serbia and its supporters never specify precisely which words in resolution 1244 they believe that Kosovo violated. But some suggest that Kosovo violated international law by preventing UNMIK from carrying out its mandate under paragraph 11 *(e)* "to facilitate a political process" designed to determine Kosovo's future status. But that paragraph required only that the international civilian presence facilitate "a" political process—not multiple political processes. And by the time that Kosovo declared independence in February 2008, the specific political process envisioned by resolution 1244 had ended. The future status process had run its course, the negotiations' potential to produce any mutually agreed outcome on Kosovo's status had been exhausted. With the Secretary-General's support, the Special Envoy [Martii Ahtisaari]—who was charged with determining the scope and *duration* of that political process—had announced that "[n]o amount of additional talks, whatever the format, will overcome this impasse," and the Envoy had specifically declared that the only viable option for Kosovo was independence.

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[57] No one is challenging that Serbia is the legal continuity of the FRY, but the law of State succession does not mean that all references in international documents to a parent are automatically considered to apply to a continuation State. See US Comments, p. 29.

[58] See US Statement, pp. 74–78; US Comments, pp. 29–31. Our Written Comments describe Belgrade's desire to avoid this possibility. Belgrade called such proposals "the most perfidious fraud Serbia has ever been exposed to", US Comments, pp. 30–31.

30. In these proceedings, some argue that the effort by some States, including the United States, to secure a new Security Council resolution on Kosovo in July 2007[62] somehow proves that we considered a successor resolution to 1244 legally necessary for Kosovo to become independent. But the draft 2007 resolution, like resolution 1244, was entirely "status-neutral." Its central legal purpose was to terminate UNMIK's operations in Kosovo, as the Ahtisaari Plan had envisioned. Nothing in the draft resolution would have decided on, or even endorsed a recommendation for, Kosovo's independence. Its non-enactment meant only that adjustments would be needed in the roles of UNMIK and the international actors envisioned in the Ahtisaari Plan. If anything, the success of the subsequent co-ordination only underscores the consistency of the declaration of independence with the operation of United Nations entities under resolution 1244.

31. In short, by February 2008, the absence of any prospect of bridging the divide between Serbia and Kosovo had rendered any further negotiations pointless. In these proceedings, Serbia ironically charges Kosovo with bad faith, suggesting that Kosovo's position favoring independence in the negotiations is in "sharp contrast" with 1244's requirements that "the sovereignty and territorial integrity of Serbia should be safeguarded." But neither UNMIK, Ahtisaari, nor the Troika ever suggested that Kosovo was negotiating in bad faith. Serbia claims that Kosovo did not need independence because Serbia had offered Kosovo the "highest degree of autonomy" under resolution 1244. But anyone who has read the factual findings of the Trial Chamber in the *Milutinović* case, who has seen photographs of Serbian tanks stationed outside the Kosovo Assembly building in March 1989, or who followed events in the Balkans during the last two decades, understands why the entire Contact Group identified Belgrade's "disastrous policies of the past [as lying] at the heart of the current problem."[66] The Contact Group admonished Serbia, not Kosovo, "to demonstrate much greater flexibility" and "to begin considering reasonable and workable compromises."[67]

32. Nor would it establish any violation of international law to argue that the Declaration of Independence was an *ultra vires* act by the Kosovo Assembly. For even if it were true that the Declaration somehow exceeded the authority conferred on the Assembly by UNMIK under the Constitutional Framework, that would only amount to a claim that it was issued by the wrong persons in Pristina. But if the Declaration were considered flawed because it issued from the Provisional Institutions of Self-Government, that technicality could now easily be fixed simply by having a different constituent body within Kosovo reissue it. No one doubts that the people of Kosovo wanted independence, or that the Declaration expressed their will. The people of Kosovo declared independence not under a "top-down" grant of domestic law authority from UNMIK, but rather, from a "bottom-up" expression of the will of the people of Kosovo, who left no doubt of their desire for independence.

33. Finally, even assuming for the sake of argument that the Declaration did somehow violate the Constitutional Framework, that Framework, like other regulations adopted by UNMIK, operated as domestic, not international, law.[69] We have previously demonstrated that UNMIK

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[62] A draft of the resolution is attached as exhibit 36 to Serbia's Statement.

[66] Statement by the Contact Group on the Future of Kosovo, London, 31 Jan. 2006, available at *http://pristina.usembassy.gov/press20060131a.html*.

[67] Contact Group Ministerial Statement, Vienna, 24 July 2006, available at *http://www.diplomatie.gouv.fr /en/IMG/pdf/statement_Vienne_24_juillet_version_finale.pdf*.

[69] UNMIK's grant of authority was to exercise "legislative and executive powers"—that is what it was doing when it promulgated Regulation 2001/9—and its responsibility was to "change, repeal or

regulations must be domestic law because they operated at the domestic level, replace existing laws, and regulate local matters. In these proceedings Serbia has conceded the accuracy of this point, but argued that UNMIK rules somehow constitute international law because they were issued by the Security Council, an international authority. But just because the Security Council authorized UNMIK to establish Kosovo's domestic law did not automatically convert that domestic law into international law. For example, an automobile driver in Kosovo might violate a speed limit in an UNMIK traffic regulation, but he surely does not violate international law simply because the entity that promulgated the law against speeding was created by an international body.

34. Mr. President, if there were ever a time when United Nations officials could have acted to set aside the Declaration of Independence, it was soon after that Declaration issued in February 2008. But the responsible organs of the United Nations made a considered decision nearly two years ago *not* to invalidate that Declaration of Independence. They made that decision with full awareness of that Declaration's specific acceptance of resolution 1244 and the international presences established by it, and fully aware of Kosovo's pledge to act consistently with all Security Council resolutions and requirements of international law.

III. THE COURT SHOULD ONLY ANSWER THE NARROW QUESTION POSED

35. Finally, Mr. President, the Court should answer only the narrow question posed. What all this has demonstrated is just how anomalous and narrow is the question presented in this case. It is not a question about whether Kosovo is an independent State today, nor whether it has been properly recognized. Nor is this case about whether UNMIK and the United Nations should be doing anything differently. It is not about whether United Nations institutions empowered to do so acted properly in declining to invalidate the Declaration of Independence nearly two years ago. Finally, it is not about whether Kosovo's future status talks—which were properly ended as "exhausted" years ago—could or should now be resumed.

36. The usual premise upon which the Court's advisory jurisdiction rests is that the requesting organ—here, the *General Assembly*—needs the Court's legal advice to carry out its functions effectively. But here the question has been asked not to give the Assembly legal advice, so much as to give advice to Member States.[75] Resolution 63/3, which referred the advisory

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suspend existing laws to the extent necessary for the carrying out of [its] functions", Report of the Secretary-General on the United Nations Interim Administration in Kosovo, S/1999/779, 12 July 1999, Dossier No. 37. A contemporaneous 2001 commentary noted that Regulation 2001/9, the Constitutional Framework, assigns to the Special Representative of the Secretary-General and KFOR "the powers that are typically associated with a federal government", A. Zimmerman and C. Stahn, "Yugoslav Territory, United Nations Trusteeship or Sovereign State", 70 *Nordic Journal of International Law* 423, 428 (2001).

[75] As this Court has emphasized in the past, advisory opinions serve to advise the organs of the *United Nations*, not individual Member States. In seeking support for its resolution, Serbia continually emphasized not the need of the General Assembly for an answer to the question, but the purported right of *Member States* to refer a question to the Court. Serbia frankly described this case as being "about the right of any member State of the United Nations to pose a simple, elementary question", asserting before the General Assembly that "[n]o country should be denied the right to refer such a matter to the ICJ"; and that a vote against the resolution "would in effect be a vote to deny the right of any country to seek—now or in the future—judicial recourse through the United Nations system." See US Statement, p. 44.

question to the Court, nowhere indicates how the Court's opinion would relate to any planned activity of the General Assembly nor does it identify any constructive use to which the General Assembly might put a Court opinion. And *unlike every prior occasion* on which the General Assembly has requested an advisory opinion, resolution 63/3 was adopted not in connection with a substantive agenda item for the General Assembly's work, but rather, only under an *ad hoc* agenda item created for the sole purpose of requesting an advisory opinion from this Court.

37. Ironically, the Member State who supported the referral of this narrow question has avowed that the Court's answer will not change even its conduct. Serbia has repeatedly said that it will not recognize Kosovo "at any cost, even in the event that the [Court's] decision is in favor of Pristina." But, Mr. President, this Court has no obligation to issue advisory opinions that the moving State has already suggested it might ignore, that seek to reopen long ended political negotiations that responsible United Nations officials have concluded are futile, or that seek to enlist the Court to unravel delicate political arrangements that have brought stability to a troubled region.

38. We therefore urge this Court to leave Kosovo's Declaration undisturbed—either by refusing to issue an opinion or by simply answering in the affirmative the question presented: whether Kosovo's Declaration of Independence accords with international law. As our written pleadings make clear, the Court may answer the question posed to it and opine that international law did not prohibit Kosovo's Declaration of Independence, without addressing other political situations or complex issues of self-determination raised by a number of States in these proceedings.

39. But if the Court should find it necessary to examine Kosovo's Declaration through the lens of self-determination, it should consider the unique legal and factual circumstances of this case, which include the extensive Security Council attention given to Kosovo; the large-scale atrocities against the people of Kosovo that led to Rambouillet and the 1244 process; the United Nations concern for the will of the people of Kosovo, their undivided territory and the unique historical, legal, cultural and linguistic attributes; the lengthy history of Kosovo's autonomy; the participation of Kosovo's representatives in the internationally led political process; the commitment of the people of Kosovo in their Declaration to respect prior Security Council resolutions and international law; and the decision by United Nations organs to leave undisturbed Kosovo's move to independence.

40. Mr. President, in its presentation yesterday, Cyprus pointedly sought to analogize the 1244 process to the heart-wrenching, but misleading, case where a parent sends a small child off to State supervision, only to lose her forever. But upon reflection, the far better analogy would be to acknowledge the futility of the State forcing an adult child to return to an abusive home against her will, particularly where the parent and child have already long lived apart, and where repeated efforts at reconciliation have reached impasse. There, as here, declaring independence would be the only viable option, and would certainly be in accordance with law.

IV. CONCLUSION

41. In conclusion, Mr. President, Kosovo's Declaration of Independence has proven to be necessary and politically stabilizing. The 2008 Declaration of Independence, and the ensuing recognition of Kosovo by many nations, brought much needed stability to the Balkans and closed the books on the protracted break-up of what once was Yugoslavia. Kosovo's Declaration of Independence emanated from a process supervised by the United Nations, which through resolution 1244 and the institutions it established, was deeply involved in Kosovo's past and present. And the Declaration of Independence has now made possible a future in which Kosovo is not merely independent politically, but also self-sufficient economically, administratively, and civilly.

42. Although Serbia, acting through the General Assembly, has urged the Court to issue an advisory opinion it hopes will reopen status negotiations to redetermine Kosovo's future, it has given this Court no reason to upend what has become a stable equilibrium. For Kosovo is now independent. Both Kosovo and Serbia are part of Europe's future. As the principal judicial organ of the United Nations, this Court should not be conscripted into a Member State's effort to roll back the clock nearly a decade, undoing a careful process accomplished under resolution 1244 and overseen by so many other United Nations bodies: the Security Council; the Special Representative of the Secretary-General; two Special Envoys, UNMIK and the Troika. And when Kosovo's independence has finally closed one of the most painful chapters in modern European history, this Court should not use its advisory jurisdiction to reopen that chapter. Instead, we should all look to a common future in which Serbia and an independent Kosovo have vitally important roles to play.

43. Mr. President, honorable Members of the Court, on behalf of my country, I thank you for your thoughtful attention.

B. U.S. RELATIONS WITH TAIWAN

On April 7, 2009, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the dismissal of a suit brought by individuals residing on Taiwan and the Taiwan Nation Party, on behalf of its members. The plaintiffs claimed that the American Institute on Taiwan "denied individual [p]laintiffs' rights and privileges as United States [non-citizen] nationals" by refusing to accept and process their applications for U.S. passports. The plaintiffs requested a declaratory judgment that, as residents on Taiwan, they are nationals of the United States, with all related rights and privileges, including those flowing from the First, Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution. *Lin v. United States*, 561 F.3d 502 (D.C. Cir. 2009). The court concluded that the case presented a nonjusticiable political question because determinations of sovereignty are reserved to the executive branch and affirmed the dismissal of the case for lack of subject matter jurisdiction. Excerpts below provide the court's analysis of the applicability of the political question doctrine. For prior developments in the case, see *Digest 2007* at 1–3 and 433–37 and *Digest 2008* at 443–47. On October 5, 2009, the Supreme Court denied certiorari. *Lin v. United States*, 130 S. Ct. 202 (2009).

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II

. . . Under the political question doctrine, a court must decline jurisdiction if there exists "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker v. Carr*, 369 U.S. 186, 217 (1962). "[D]ecision-making in the fields of foreign policy and national security is textually committed to the political branches of government." *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005). Because deciding sovereignty is a political task, Appellants' case is nonjusticiable. *Jones v. United States*, 137 U.S. 202, 212 (1890) ("Who is the sovereign, *de*

jure or *de facto*, of a territory, is not a judicial, but a political[] question . . . ."); *Baker*, 369 U.S. at 212 ("[R]ecognition of foreign governments so strongly defies judicial treatment that without executive recognition a foreign state has been called 'a republic of whose existence we know nothing . . . .").

Appellants argue this is a straightforward question of treaty and statutory interpretation and well within the Article III powers of the court. It is and it isn't. The political question doctrine deprives federal courts of jurisdiction, based on prudential concerns, over cases which would normally fall within their purview. *National Treasury Employees Union v. United States*, 101 F.3d 1423, 1427 (D.C. Cir. 1996). We do not disagree with Appellants' assertion that we *could* resolve this case through treaty analysis and statutory construction, *see Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986) . . . ; we merely decline to do so as this case presents a political question which strips us of jurisdiction to undertake that otherwise familiar task. . . .

Once the Executive determines Taiwan's sovereign, we can decide Appellants' resulting status and concomitant rights expeditiously. *Baker*, 369 U.S. at 212 . . . . But for many years—indeed, as Appellants admit, since the signing of the SFPT [San Francisco Peace Treaty of September 8, 1951, under which Japan renounced "all right, title and claim to Formosa and the Pescadores"] itself—the Executive has gone out of its way to avoid making that determination, creating an information deficit for determining the status of the people on Taiwan. . . .

Identifying Taiwan's sovereign is an antecedent question to Appellants' claims. This leaves the Court with few options. We could jettison the United States' long-standing foreign policy regarding Taiwan—that of strategic ambiguity—in favor of declaring a sovereign. But that seems imprudent. Since no war powers have been delegated to the judiciary, judicial modesty as well as doctrine cautions us to abjure so provocative a course.

Appellants attempt to side-step this fatal hurdle by asserting that, for the limited purpose of determining their status and rights under U.S. law, the issue of sovereignty is already decided under the SFPT. According to them, as the "principal occupying power" under the treaty, the United States retains temporary *de jure* sovereignty over Taiwan. Consequently, Appellants urge us to remember recognizing that the determination of sovereignty over an area is a political question "does not debar courts from examining the status resulting from prior action." *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 380 (1948). True enough. However, under the interpretation of the political departments to whom we must defer in such matters, *Pearcy v. Stranahan*, 205 U.S. 257, 265 (1907) (deferring to "the interpretation which the political departments have put upon [a] treaty" when resolving a question of sovereignty), it remains unknown whether, by failing to designate a sovereign but listing the United States as the "principal occupying power," the SFPT created any kind of sovereignty in the first place. Therefore, the "prior action" on which Appellants rely is not only an open question, but is in fact the same question Appellants insist they do not require this Court to answer: who is Taiwan's sovereign? Appellants may even be correct; careful analysis of the SFPT might lead us to conclude the United States has temporary sovereignty. But we will never know, because the political question doctrine forbids us from commencing that analysis. We do not dictate to the Executive what governments serve as the supreme political authorities of foreign lands, *Jones*, 137 U.S. at 212; this rule applies *a fortiori* to determinations of U.S. sovereignty.

* * * *

Finally, Appellants attempt to analogize the United States' former relationship with the Philippines, after Spain ceded the Philippine Islands to the United States in 1898, to its current

relationship with Taiwan. The comparison is inapposite. Congress, not a court, declared the Filipino population was "entitled to the protection of the United States" based on the United States' sovereignty over the Philippines. *See Rabang v. Boyd*, 353 U.S. 427, 429 (1957). Later, Congress acknowledged "the final and complete withdrawal of American sovereignty over the Philippine Islands" and stripped the Filipino people of their non-citizen national status. *Id.* at 429–30. Therefore, unlike here, courts confronting claims involving the rights enjoyed by Filipinos had no need to determine sovereignty over the Philippine Islands.

* * * *

C. EXECUTIVE BRANCH AUTHORITY OVER FOREIGN STATE RECOGNITION AND PASSPORT ISSUANCE

Status of Jerusalem

On July 6, 2009, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the dismissal of a suit seeking to compel the State Department to list "Israel" as the place of birth in the passport (and consular report of birth) for a U.S. citizen child born in Jerusalem. *Zivotofsky v. Secretary of State*, 571 F.3d 1227 (D.C. Cir. 2009). The State Department instructs passport officials to list only "Jerusalem" as the place of birth of such citizens because of the United States' longstanding policy of leaving the status of Jerusalem to be determined by the parties to the Arab-Israeli dispute.

The case was filed on behalf of a child born in Jerusalem whose parents sought to compel the Department to comply with § 214(d) of the FY 2003 Foreign Relations Authorization Act, Pub. L. No. 107-228, 116 Stat. 1350, which directs the Secretary of State to list "Israel" as the place of birth of a citizen born in Jerusalem, when the citizen so requests. In the majority's decision, the court concluded that, because the executive branch has sole constitutional authority to recognize foreign governments and the President's decision not to recognize any government as sovereign over Jerusalem represents an exercise of his recognition power, the judiciary could not order the executive branch to change the nation's foreign policy in this matter. Therefore, the court concluded that the case was nonjusticiable under the political question doctrine. In a concurring opinion, the third judge on the panel found the political question doctrine inapplicable, as he saw the court's role as determining the constitutionality of § 214(d). The concurrence identified two dispositive questions: (1) whether the Jerusalem policy falls within the President's exclusive power to recognize foreign sovereigns and (2) whether § 214(d) impermissibly intrudes on that power. The concurrence answered both affirmatively and concluded that § 214(d) is unconstitutional.

On August 21, 2009, the plaintiff-appellants filed a petition for rehearing en banc. In response to the court of appeals' order, on September 15, 2009, the United States submitted a brief opposing rehearing. The full text of the U.S. brief is available at *www.state.gov/s/l/c8183.htm*. As of the end of 2009, the court of appeals had not acted on the petition for rehearing en banc.[*]

Excerpts follow from the panel majority's analysis of the applicability of the political question doctrine and the concurrence's analysis in concluding that the Jerusalem policy falls within the President's exclusive power to recognize foreign sovereigns and that § 214(d) is unconstitutional (footnotes and citations to the Joint Appendix and other submissions in the case omitted). For prior developments in the case, see *Digest 2006* at 530–47, *Digest 2007* at 437–43, and *Digest 2008* at 447–54; the government's 2008 brief in the court of appeals is available as document 3 for *Digest 2008* at *www.state.gov/s/l/c8183.htm*.

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Majority Opinion

II.

In *Baker v. Carr* [369 U.S. 186 (1962)], the Supreme Court held that courts may not consider claims that raise issues whose resolution has been committed to the political branches by the text of the Constitution. 369 U.S. at 217 . . . .

It is well established that the Constitution's grant of authority to the President to "receive Ambassadors and other public Ministers," U.S. CONST. art. II, § 3, includes the power to recognize foreign governments. . . . That this power belongs solely to the President has been clear from the earliest days of the Republic. . . . The Supreme Court has recognized this constitutional commitment of authority to the President repeatedly and consistently over many years. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964) ("Political recognition [of a foreign sovereign] is exclusively a function of the Executive."); *Goldwater v. Carter*, 444 U.S. 996, 1007 (1979) (Brennan, J., dissenting) ("Our cases firmly establish that the Constitution commits to the President alone the power to recognize, and withdraw recognition from, foreign regimes." (citing *Sabbatino*, 376 U.S. at 410; *Baker*, 369 U.S. at 212; *United States v. Pink*, 315 U.S. 203, 228–30 (1942))).

The President's exercise of the recognition power granted solely to him by the Constitution cannot be reviewed by the courts. . . . A decision made by the President regarding which government is sovereign over a particular place is an exercise of that power. . . . As a result, we have declined invitations to question the President's use of the recognition power. . . .

Thus the President has exclusive and unreviewable constitutional power to keep the United States out of the debate over the status of Jerusalem. Nevertheless, Zivotofsky asks us to review a policy of the State Department implementing the President's decision. But as the Supreme Court has explained, policy decisions made pursuant to the President's recognition power are nonjusticiable political questions. *See Pink*, 315 U.S. at 229 . . . . And every president since 1948

[*] Editor's note: On June 29, 2010, the D.C. Circuit denied the petition for rehearing en banc. *Zivotofsky v. Secretary of State*, 610 F.3d 84 (D.C. Cir. 2010).

has, as a matter of official policy, purposefully avoided taking a position on the issue whether Israel's sovereignty extends to the city of Jerusalem. The State Department's refusal to record "Israel" in passports and Consular Reports of Birth of U.S. citizens born in Jerusalem implements this longstanding policy of the Executive. *See Haig v. Agee*, 453 U.S. 280, 292 (1981) (recognizing that a U.S. passport is an official government document used to communicate with foreign governments). By asking the judiciary to order the State Department to mark official government documents in a manner that would directly contravene the President's policy, Zivotofsky invites the courts to call into question the President's exercise of the recognition power. This we cannot do. We therefore hold that Zivotofsky's claim presents a nonjusticiable political question because it trenches upon the President's constitutionally committed recognition power.

Zivotofsky argues that the political question doctrine cannot foreclose a court from enforcing a duly enacted law. . . . Enforcement of the rights Congress created presents no political question. The government responds that even if we find jurisdiction to consider Zivotofsky's claim, we must nevertheless strike section 214(d) as an unconstitutional infringement on the President's recognition power. We agree that resolving Zivotofsky's claim either at the jurisdictional stage under the political question doctrine or on the merits by striking section 214(d) implicates the recognition power. Only the Executive—not Congress and not the courts—has the power to define U.S. policy regarding Israel's sovereignty over Jerusalem and decide how best to implement that policy. The question for us is whether Zivotofsky loses on jurisdictional grounds, or on the merits because Congress lacks the power to give him an enforceable right to have "Israel" noted as his birthplace on his government documents.

Under the Supreme Court's precedent and our own, the answer must be the former. We are aware of no court that has held we cannot or need not conduct the jurisdictional analysis called for by the political question doctrine simply because the claim asserted involves a statutory right. We must always begin by interpreting the constitutional text in question and determining "whether and to what extent the issue is textually committed." *Nixon*, 506 U.S. [224,] 228 [(1993)]. The question is not whether the courts are competent to interpret a statute. Certainly we are. But as our recent decision makes clear, we will decline to "resolve [a] case through . . . statutory construction" when it "presents a political question which strips us of jurisdiction to undertake that otherwise familiar task." *Lin* [*v. United States*], 561 F.3d at 506. [Editor's note: For further discussion of *Lin v. United States*, see B., *supra*.] In a case such as this, to borrow the words of Professor Wechsler, "abstention of decision" is required because deciding whether the Secretary of State must mark a passport and Consular Report of Birth as Zivotofsky requests would necessarily draw us into an area of decisionmaking the Constitution leaves to the Executive alone. *See* HERBERT WECHSLER, PRINCIPLES, POLITICS AND FUNDAMENTAL LAW 11–14 (1961). That Congress took a position on the status of Jerusalem and gave Zivotofsky a statutory cause of action . . . is of no moment to whether the judiciary has authority to resolve this dispute between the political branches. . . . We decline to be the first court to hold that a statutory challenge to executive action trumps the analysis in *Baker* and *Nixon* and renders the political question doctrine inapplicable.

* * * *

Concurring Opinion

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[II.]B. The President's Passport Policy Regarding the Designation of Jerusalem Is an Exercise of the Recognition Power

The Executive and Congress historically have shared authority over the regulation of passports. However, "[f]rom the outset, Congress [has] endorsed not only the underlying premise of Executive authority in the areas of foreign policy and national security, but also its specific application to the subject of passports. Early Congresses enacted statutes expressly recognizing the Executive authority with respect to passports." *Haig v. Agee*, 453 U.S. 280, 294 (1981); *see also id*. at 292–300 (discussing history of congressional legislation and Executive control over passports); *Kent v. Dulles*, 357 U.S. 116, 122–24 (1958) (same). Congress passed the first Passport Act in 1856, endorsing the Executive's power to control passports, *Kent*, 357 U.S. at 123. The current Passport Act maintains this recognition of Executive authority. 22 U.S.C. § 211a ("The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic and consular officers of the United States and by such other employees of the Department of State[] . . . .").

Although Congress often has recognized the authority of the Executive to regulate the issuance of passports, this obviously does not confirm that the Executive retains exclusive control over all matters relating to passports. Indeed, the history of congressional legislation in this area suggests otherwise. *See, e.g.*, 22 U.S.C. § 211a (restricting the Executive department from designating a passport as restricted for travel "[u]nless authorized by law"). It is clear, however, that Congress lacks the power to interfere with a passport policy adopted by the Executive in furtherance of the recognition power. . . . The record in this case supports the Secretary's claim that the policy relating to the designation of Jerusalem on passports lawfully "govern[s] the question of recognition." *Pink*, 315 U.S. at 229.

. . . The United States has long refrained from recognizing Jerusalem as a city located within the sovereign state of Israel. . . .

The Secretary's rules regarding the designation of Jerusalem on passports obviously aim[] to further the United States' policy regarding the recognition of Israel. . . .

* * * *

. . . The Executive's policy is not to prejudge the status of Jerusalem, and any official statement to the contrary impinges upon the Executive's prerogative. The Executive has the *exclusive* authority to implement policies in furtherance of the recognition power and this court has no authority to second-guess the Executive's judgment when, as here, it is clear that the disputed policy is in furtherance of the recognition power.

* * * *

D. Section 214(d) Unconstitutionally Infringes the President's Exclusive Power to Recognize Foreign Sovereigns

The final question in this case is whether § 214(d) of the Foreign Relations Authorizations Act, which affords Zivotofsky a statutory right to have "Israel" listed as the place of birth on his passport, is a constitutionally valid enactment. Given the mandatory terms of the statute, it can hardly be doubted that § 214(d) intrudes on the President's recognition power. In commanding that the Secretary *shall* record Israel as the place of birth upon the request of a citizen who is born in

Jerusalem and entitled to a United States passport, the statute plainly defies the Executive's determination to the contrary. . . .

Zivotofsky argues that § 214(d) cannot be seen to interfere with the Executive's recognition power, because the statute here is no different from another uncontested legislative action taken by Congress with respect to Taiwan. In 1994, Congress enacted a provision requiring that, "[f]or purposes of the registration of birth or certificate of nationality of a United States citizen born in Taiwan, the Secretary of State shall permit the place of birth to be recorded as Taiwan." Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 132, 108 Stat. 382 (1994) (as amended by State Department: Technical Amendments, Pub. L. No. 103-415, § 1(r), 108 Stat. 4299, 4302 (1994)). This example is inapposite. Following the enactment of the statute covering Taiwan, the State Department determined that the congressional provision was consistent with the United States' policy that the People's Republic of China is the "sole legal government of China" and "Taiwan is a part of China." U.S. Department of State Passport Bulletin 94-12 (Nov. 7, 1994). Because listing "Taiwan" did not contravene the President's position regarding China's sovereignty, the State Department allowed American citizens born in Taiwan to record "Taiwan" as their place of birth. *See id*. The present case is different from the Taiwan example. The State Department here has determined that recording Israel as the place of birth for United States citizens born in Jerusalem misstates the terms of this country's recognition of Israel.

The more important point here is that the President has the exclusive power to establish the policies governing the recognition of foreign sovereigns. The Executive may treat different situations differently, depending upon how the President assesses each situation. These are matters within the exclusive power of the Executive under Art. II, § 3, and neither Congress nor the Judiciary has the authority to second-guess the Executive's policies governing the terms of recognition.

"[I]t remains a basic principle of our constitutional scheme that one branch of the government may not intrude upon the central prerogatives of another." *Loving v. United States*, 517 U.S. 748, 757 (1996). In my view, the bottom line of the court's judgment in this case is inescapable: "Section 214(d) is unconstitutional. Article II assigns to the President the exclusive power to recognize foreign sovereigns, and Congress has no authority to override or intrude on that power." Section 214(d) impermissibly intrudes on the President's exclusive power to recognize foreign sovereigns. . . .

Cross References

UN Interim Administration Mission in Kosovo following Kosovo's independence, **Chapter 17.B.4.**
Russia/Georgia, **Chapter 18.A.1.b.(2)**